SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 344

C. F. MOODY,

Petitioner,

vs.

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE, ET AL.

Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Opinion of the Court of Appeals appears in the record (79-82), and is not yet reported.

The questions presented, the statutes involved, statements of jurisdiction and of the case, and reasons relied upon, appear in the foregoing Petition, and in the interest of brevity are not repeated here.

Specification of Error.

It was error for the Court of Appeals to hold that the United States was free to abandon the condemnation proceeding at any time before payment of the award, and that it took no title until payment, and that the appropriation of the land by the United States did not make these rules

inapplicable, and that, therefore, the United States District Court in North Carolina had no authority to enter a personal judgment against the United States, the Court of Appeals thereby failing to distinguish between a condemnation proceeding in which there has been an appropriation, and a condemnation proceeding in which there has been none.

ARGUMENT.

I.

A personal judgment is proper in a proceeding under the General Condemnation Statute (Act of August 1, 1888), c. 728, 25 Stat. 357, 40 U. S. C., Sections 257, 258) where the land has been taken by consent or otherwise before compensation has been made.

In January, 1935, the United States appropriated petitioner's lands (R. 80). Such appropriation occurred about 18 months prior to the institution of the condemnation proceedings (R. 10-14), and has since continued without interruption (R. 80-82), and is continuing today. In its judgment entered January 24, 1939, the United States District Court in North Carolina found that petitioner "has been deprived of the title to, use of, and occupation of the lands which are the subject of this controversy and of the privilege of disposing of said property, and for that reason said property has, in contemplation of law, been taken and appropriated " (R. 23). No appeal was prosecuted from that judgment, or from any part thereof (R. 27, 46, 81), or contention raised against the right of the North Carolina Court to find that the land had been so appropriated.

The United States Court of Appeals for the District of Columbia, in finding that the Government took immediate possession in January, 1935, apparently assumed the posi-

tion that the same may have been effected under the privileges contained in the option executed December 7, 1934 (R. 82). However, the Government's proceeding in North Carolina was not brought under the option, but was brought as an independent condemnation action under the general condemnation statute, and so any rights given in the option could not have had application (R. 9, 13, 14, 22, 45, 46, 52, 53, 80). However, irrespective of the foregoing, the fact is that the United States has continuously appropriated the property for the past 8½ years, and still does, having initially appropriated it by cutting and removing large quantities of timber, acid wood, and other wood products, and by constructing roads on said land to remove said timber and products, and by incorporating said lands in its official maps as part of the National Forest Reserve (R. 15, 21, 22, 46).

In *Danforth* v. *United States*, 308 U. S. 271, 60 S. Ct. 231, 84 L. Ed. 240, this Court held that the time of taking in condemnation proceedings under the Flood Control Act of May 15, 1928, is the time of payment of the money award by the United States, unless a taking has occurred previously, in actuality or by a statutory provision fixing it otherwise; and that the Government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon the land a burden, actually experienced, of caring for floods greater than it bore prior to construction. It would appear that in such circumstances, which are essentially those of the case at bar, a personal, and not a conditional, judgment is appropriate, and is required in the condemnation proceeding.

In *Barnidge* v. *United States*, 101 F. 2d 295, C. C. A. 8th (1939), the court held that where the Government has taken possession and appropriated property prior to entry of

judgment in condemnation, then the judgment is an obligation of the general fund of the Treasury. The court added that "it has been held quite generally that where, as here, possession of the property is not taken at or prior to the institution of condemnation proceedings, the proceedings may be abandoned at any time before the actual acceptance of the property and payment therefor". Accordingly, it would appear therefrom that where, as in the case at bar, appropriation has actually been effected, at, or prior to, the institution of condemnation proceedings, the latter may not be abandoned before acceptance and payment, and that, therefore, a conditional judgment in said proceedings is inadequate and improper, and a personal money judgment is required and proper.

29 *Corpus Juris Secundum*, Paragraph 321, page 1360:

> "In general, whether a personal judgment may be rendered against the condemnor, depends on whether possession has been taken of the property. Since, as appears infra #375, it is the rule in many jurisdictions that the condemnor may, after judgment, but before possession is acquired, abandon the proceedings, it is ordinarily improper to render a personal judgment against the condemnor where the effect of the award and judgment is merely to fix the compensation, and no entry on the land has been made. But a personal judgment is proper where the land has been taken by consent or otherwise before compensation has been made."

It was held in *Matthews* v. *U. S.*, 113 F. 2nd 452 (C. C. A. 8th), 1940, that the Supreme Court of the United States has laid down the general rule that until taking, the condemnor may discontinue or abandon his effort, citing therein *Danforth* v. *United States*, 308 U. S. 271, 60 S. Ct. 231, 84 L. ed. 240; *Barnidge* v. *United States*, 8th Cir., 101 F. 2nd 295, 298; *Johnson & Wimsatt* v. *Reichelfelder*, 66 F. 2nd 217.

62 App. D. C. 237; *Owen* v. *United States,* 5th Cir., 8 F. 2nd 992; *Kanukanui* v. *United States,* 9th Cir., 244 F. 923.

Certiorari in above *Matthews* case was denied, 61 S. Ct. 142, 311 U. S. 703, 85 L. ed. 456. Accordingly, it would appear therefrom that if there has been a taking before the termination of the condemnation proceeding, the condemnor may not discontinue or abandon his effort, contrary to the holding herein of the Court of Appeals.

The court in *U. S. Fidelity and Guaranty Company* v. *City of Asheville, N. C.,* 85 F. 2nd 966, C. C. A. 4th (1936), stated:

> "The rule is well settled that the liability of the condemnor in condemnation proceedings cannot be avoided by abandonment of the proceedings after the landowner's right to compensation has become vested. *Garrison* v. *City of New York,* 21 Wall. 196 204, 22 L. ed. 612, 10 R. C. L. 237, 20 C. J. 1070. There is some conflict in the authorities as to whether the right to compensation becomes thus vested when the award is confirmed or only when the compensation awarded is paid or the land taken. See cases cited in Ann. Cas. 1913 E. 1062, and L. R. A. 1916 C. 644."

Where the Government takes possession and appropriates property prior to entry of judgment in condemnation, the judgment is an obligation of the general fund of the Treasury. *U. S.* v. *A Certain Tract or Parcel of Land in Chatham County, Ga.,* 44 F. Supp. 712.

In *Hessel* v. *A. Smith and Co.,* 15 F. Supp. 953. 956 (Illinois), which was a condemnation proceeding under Sections 258-a-e, Title 40 U. S. C. (Feb. 26, 1931, c. 307, Sections 1-5, 46 Stat. 1421, 1422), the court held:

> "It thus appears that the United States is irrevocably bound, having taken possession and title to said land under said statute and order of Court, to afford to the persons entitled thereto just compensation for the lands

so taken, including interest on any deferred payment thereof; such compensation to be ascertained and established by a judgment in the pending condemnation proceeding."

ARGUMENT.

II.

Where a taking occurred prior to the institution of condemnation proceedings August 21, 1936, such taking having continued during the pendency of said proceedings, and after their termination, and still continues, the judgment rendered in said proceedings on January 24, 1939, on adjudication of appropriation and on jury's verdict of value, no appeal therefrom having been prosecuted, is final, valid, and binding, without the further requirement upon the judgment creditor of re-litigating the same issues between the same parties in a proceeding to be instituted as under the Tucker Act.

In its Opinion, the Court of Appeals remands petitioner to the Tucker Act for relief (R. 82).

Such ruling overlooks that the United States took this land in January, 1935 (R. 80), and that such taking has since continued, and still continues; that an appropriation was formally adjudged by a Federal Court on January 24, 1939, which simultaneously decreed recovery of compensation based on a jury's verdict of value (R. 20-24), the judgment remaining unappealed (R. 46, 81); that for the past 8½ years petitioner has been deprived of all use of these lands, and since January 24, 1939, of title thereto, no payment of any kind having been made by the United States (R. 46), which in effect has kept petitioner's land and also his rightful compensation therefor; that after moving August 30, 1938, in its condemnation proceedings for permission to withdraw petitioner's land from its said proceedings (R.

59, 61, 80), the United States did move in said proceedings, on December 3, 1938, that it be permitted to withdraw its above motion to withdraw, and that the cause thence proceed to judgment (R. 46, 62, 80).

Accordingly, the judgment entered January 24, 1939, granting, *inter alia*, this last motion (R. 24), is in effect judgment procured by the United States, as it was rendered in a proceeding instituted by the United States, and in direct pursuance of its said motion of December 3, 1938.

As the record herein discloses, the Government's condemnation proceeding as such continued over the period August 21, 1936, to January 24, 1939 (R. 9-14), with resulting heavy expense upon petitioner in properly defending his interests therein. Although the United States prosecuted no appeal from said judgment of January 24, 1939, nor from any part thereof, it has declined to pay the recovery decreed therein (R. 46), simultaneously, however, and since, retaining the land. Since May, 1941 (R. 2-9), in an endeavor to secure payment of said recovery, petitioner has had the burden and expense of prosecuting proceedings for mandatory injunction in the United States District Court, and in the United States Court of Appeals for the District of Columbia. Two United States District Courts consider that the judgment entered January 24, 1939, is final, valid and binding, namely, the court which entered this judgment (R. 20-24), and also the United States District Court for the District of Columbia (R. 44-47). In the circumstances, an additional severe hardship would be visited upon this aged citizen in requiring him to carry the further heavy burden of instituting and prosecuting, probably at considerable length, proceedings under the Tucker Act which would have as their purpose the re-litigation between the same parties, of issues already determined in condemnation proceedings.

If the Government had intended to rely on any of the

provisions of the option and the letter of acceptance, it should have pleaded them upon the trial in the condemnation case. Not having done so, none of their provisions can now be considered.

It was said by Mr. Justice Roberts in *Baldwin* v. *Iowa State Traveling Men's Ass'n,* 238 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517:

> "Public Policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried, shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one volutarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

The United States is required in a condemnation proceeding to present every available ground in support of its asserted right. It can not prosecute that right piecemeal, so stated by Mr. Justice Vandevanter in *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 479, 74 L. ed. 972, 979, 50 S. Ct. 374:

> "As the ground just described was available, but not put forward, the appellant must abide the rule that a judgment upon the merits in one suit is res judicata in another where the parties and the subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end."

In *United States* v. *Norwegian Barque Theckla,* 266 U. S. 328, 45 S. Ct. 112, 69 L. ed. 313, this Court said:

> "When the United States comes into a Court to assert a claim, it so far takes the position of a private suitor

as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability where but for its soverignty it would be liable, does not destroy the justice of the claims against it. * * * It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the Courts may decide to be reasonably incident to that act."

This Court distinguished the *Theckla* case from *United States* v. *Shaw*, 309 U. S. 465, 84 L. ed. 888, holding in the latter (P. 502, 503) that it comprised in effect two actions as against the one litigation (libel and cross-libel) comprising the *Theckla* case. The condemnation proceeding herein is similarly one litigation, rendering the *Theckla* decision particularly applicable.

In *United States* v. *Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539, this Court said, at S. Ct. page 356:

"We are of the opinion that under these pleadings and issues raised thereby, the Circuit Court (of the United States) had jurisdiction to inquire whether the acts done by the officers of the United States under the direction of Congress, had resulted in such an overflow and injury of the plaintiff's land as to render it absolutely valueless, and if thereby the property was, in contemplation of law, taken and appropriated by the Government, to render judgment against it for the value of the property so taken and appropriated." (Parenthetical matter supplied.)

ARGUMENT.

III.

Excepting Danforth v. United States, 308 U. S. 271, and Barnidge v. United States, 101 F. (2d) 295, which actually support petitioner's contentions, all decisions relied upon in the Appellate Court decision, and indicated below, appear inapplicable in view of their distinguishing facts.

In *United States* v. *U. S. Fidelity and Guaranty Co.*, 309 U. S. 506, 84 L. ed. 894 (R. 81), it was held that immunity

of the United States and of Indian Nations in tutelage, from suit as defendants, could not be waived by official failure to object to the jurisdiction or to appeal from the judgment. But the condemnation proceeding in the cause at bar was instituted and prosecuted by the United States under the general condemnation statute, 40 U. S. C., Sections 257, 258; and final judgment was entered therein upon motion of the United States, condemnor.

In *Haskins Bros.* v. *Morgenthau*, 85 F. 2nd 677, 66 App. D. C. 178 (R. 81), it was held that a suit against the Secretary of the Treasury, Treasurer, and Comptroller General, in their official capacities, to compel return to processors of taxes which had been collected on imported cocoanut oil, was in effect a suit against the United States, to which the latter was a necessary party, and, therefore, could not be maintained where the United States had not consented to be sued. But the cause at bar concerns, not a proceeding as such still in prosecution, but a final and unappealed judgment entered in an action long since concluded and determined, in which the United States was not only a party but was the party plaintiff, and throughout its long pendency the moving party.

United States v. *Boston C. C. Co.*, 271 Fed. 877, C. C. A. 1st, next cited (R. 81), is inapplicable as no prior appropriation therein appears, as in the case at bar.

Danforth v. *United States*, 308 U. S. 271, next cited (R. 81), discussed hereinabove, supports petitioner's contentions, as it holds that the time of taking in condemnation is the time of the payment of the money award, *unless a taking has occurred previously, in actuality or by a statutory provision fixing it otherwise.* In the case at bar there was a prior taking, in actuality, which has since continued, and hence the exception applies.

In *Hanson Lumber Co.* v. *United States*, 261 U. S. 581, 43 S. Ct. 442, 67 L. ed. 809, next cited (R. 81), it was held that an act authorizing purchase of specific property, and limiting the price to be paid, did not preclude resort to condemnation under a general statutory authority to proceed in that way, title not to pass until compensation had been ascertained and paid, with no right to possession in the condemnor until reasonable, certain, and adequate provision had been made for obtaining compensation. In the case at bar, there has been no legislative act for purchase of specific property at a limited price; and title was decreed 4½ years ago as having passed, no compensation having then, or yet, been paid, appropriation having continued from January, 1935, and still continuing.

As heretofore observed, in *Barnidge* v. *United States*, 101 F. (2d) 295, next cited (R. 81), the court held that where possession of the property is not taken at or prior to the institution of condemnation proceedings, the latter may be abandoned at any time before the actual acceptance of the property and payment therefor. Conversely, it would appear that where possession is taken at or prior to such proceedings, the latter may not be abandoned before payment, and that personal money judgment can and should be entered therein. If a conditional judgment were entered under the circumstances of prior appropriation by the condemnor, who, however, declined to pay the award made in such proceedings, meanwhile retaining and continuing such appropriation, the proceeding might be held to remain pending indefinitely under legal impasse, because, having already appropriated, the condemnor could not abandon. Accordingly, the entry therein of a personal judgment would appear to be the solution.

United States v. *Bouchard*, 64 F. (2d) 482, C. C. A. 2nd, next cited (R. 81), holds that in condemnation proceedings instituted by the United States in Vermont, title does not

vest before payment of the judgment awarding damages, and that, therefore, the landowner's judgment against the Government is not absolute if the Government elects to abandon. A prior appropriation of the property does not appear to have occurred there, as here. Moreover, in the case at bar, the Government has never elected to abandon. On the contrary, it still holds on to the property after 8½ years of uninterrupted appropriation, exercising all acts of ownership except that of having paid the award.

In *Kanukanui* v. *United States*, 244 Fed. 923, next cited (R. 81), it was held that the institution and prosecution by the United States of a proceeding for the condemnation of property is not a "taking" of the property, and that the proceeding may be abandoned at any time. As no appropriation, or even encroachment, appears therein, this decision is inapplicable.

In *Hurley* v. *Kincaid*, 285 U. S. 95, 76 L. ed. 637, 52 S. Ct. 267 (R. 81), next cited, the land was embraced in a plan for development of protection against rising waters, authorized by the Mississippi River Flood Control Act, the landowner having conceded that such Act was valid and that it authorized the taking of his lands or an easement therein. However, he sought to enjoin carrying out of the proposed flood control work as it would affect his property, until condemnation proceedings therefor had been prosecuted; and such relief was denied.

The case at bar involves no injunction issuance to restrain a taking, the Government having already appropriated, not under any special Act providing for an emergency seizure of certain lands, but in anticipation of the exercise of its general powers of condemnation under the aforementioned Act of August 1, 1888; and it did thereafter exercise those general powers by a proceeding which continued over 2½ years.

Cherokee Nation v. *Southern Kansas Ry.*, 135 U. S. 641, 34 L. ed. 295, 10 S. Ct. 965, next cited (R. 81, 82), arose out of special Act of Congress of July 4, 1884, granting right of way to a railroad company through lands of the above Nation, pursuant to which condemnation proceedings were instituted, not by the United States but by the railroad company. The Act provided that before the railway should be constructed through any lands proposed to be taken, full compensation had to be made for all property proposed to be taken, and that if the landowners should appeal from the initial award, the company, by posting double the amount of the award, would be permitted to enter upon the land sought to be condemned, and proceed with the railroad construction.

This Court held that such provisions were adequate to secure just compensation, particularly as under said Act, title did not pass until compensation had been actually made; that the property, if entered upon during the appeal under the above requirements, was not taken until compensation had been ascertained, and then being paid, the title passed; that the property stood conditionally appropriated only, after double the initial award had been posted.

It does not appear that actual entry had been made upon said lands, but merely that entry had been proposed.

In the case at bar, the condemnor is the United States, not a private company, acting under the general condemnation statute, not under any special Act of Congress; and the condemnor made entry and appropriation, not as permitted on an appeal after double the amount of the initial award had been deposited, but before the institution of any condemnation proceedings, with no security to the landowner except its good name and credit, which was readily accepted. It is clear that as the prospective condemnor in the case cited was the railroad company, with its resources as sole security for the landowner, Congress was desirous

of establishing particularly ample safeguards for payment, and the question even arose, which this Court termed embarrassing, as to the landowner's relief if the ultimate compensation should exceed the double award deposit required to be made by the company on appeal by the landowner, before entering. Accordingly, this case is not controlling here.

In *Jacobs* v. *United States,* 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142, next cited (R. 82), this Court determined what may be claimed as interest in a suit brought under the Tucker Act to recover compensation for property taken. However, none of the elements governing the case at bar appears therein, including prior condemnation proceedings, and an unappealed adjudication of appropriation and value, and for recovery, thereby rendering any later Tucker Act proceeding merely a re-litigating of the same issues between the same parties.

And for the same reasons *United States* v. *Meyer,* 113 F. (2d) 387, next cited (R. 82), also appears inapplicable.

Conclusion.

WHEREFORE, it is urged that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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